DEPARTMENT OF DEFENSE
DEFENSE OFFICE OF HEARINGS AND APPEALS

In the matter of:	)	
	)	
[Redacted]	)	ISCR Case No. 11-03906
	)	
Applicant for Security Clearance	)	

Appearances

For Government: Braden M. Murphy, Esq., Department Counsel
For Applicant: *Pro se*

07/27/2012

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Decision

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FOREMAN, LeRoy F., Administrative Judge:

This case involves security concerns raised under Guideline B (Foreign Influence). Eligibility for access to classified information is denied.

Statement of the Case

Applicant submitted a security clearance application on August 11, 2008, while on active duty in the U.S. Air Force, seeking a top secret clearance. On January 20, 2012, the Defense Office of Hearings and Appeals (DOHA) notified him that it was unable to find that it was clearly consistent with the national interest to continue his access to classified information, and it recommended that his case be submitted to an administrative judge for a determination whether to continue or revoke his clearance. DOHA set forth the basis for its action in a Statement of Reasons (SOR), citing security concerns under Guideline B. DOHA acted under Executive Order 10865, *Safeguarding Classified Information within Industry* (February 20, 1960), as amended; Department of Defense Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (January 2, 1992), as amended (Directive); and the adjudicative guidelines (AG) implemented by the Department of Defense on September 1, 2006.

Applicant received the SOR on January 27, 2012; answered it on February 6, 2012; and requested a determination on the record without a hearing. Department Counsel requested a hearing on March 2, 2012, but withdrew the request on May 14, 2012. On May 24, 2012, Department Counsel submitted the Government's written case. On May 25, 2012, a complete copy of the file of relevant material (FORM) was sent to Applicant, who was given an opportunity to file objections and submit material to refute, extenuate, or mitigate the Government's evidence. He received the FORM on June 14, 2012, and he submitted additional materials on June 25, 2012, which were included in the record without objection from Department Counsel. The case was assigned to me on July 19, 2012.

Administrative Notice

Department Counsel requested that I take administrative notice of relevant facts about Russia. The facts administratively noticed are set out below in my findings of fact.

Findings of Fact

In his answer to the SOR, Applicant admitted the allegations in SOR ¶¶ 1.a and 1.b, alleging that his wife is a citizen of Russia and his mother-in-law is a citizen and resident of Russia. His admissions are incorporated in my findings of fact.

Applicant is a 46-year-old aircraft mechanic employed by a defense contractor and currently stationed in Afghanistan. When he submitted his security clearance application, he was a master sergeant on active duty in the U.S. Air Force. He submitted his application in anticipation of assuming duties requiring a top secret clearance. He held a security clearance for all of his Air Force service. He retired from the Air Force after about 26 years of service. While on active duty, he received the Meritorious Service Medal six times, the Air Force Commendation Medal three times, and the Air Force Achievement Medal six times. He was hired by his current employer and deployed to Afghanistan after answering the SOR.

Applicant met his wife, a citizen of Russia, in April 2004, while he was on active duty in the Air Force and assigned to a base in the Republic of Korea.[1] His wife was then working as a dancer in an off-base club. They married in January 2008, while Applicant was assigned to a base in Italy. At the time of their marriage, Applicant's wife had never resided in the United States. (Personal Subject Interview (PSI) at 2.) As of the date of Applicant's response to the FORM, she had resided in the United States for about two years. Applicant states that his wife hopes to apply for U.S. citizenship next year.

While living in Russia, Applicant's wife worked in an administrative position for a government-operated power company and as a card dealer at a casino. Applicant's

[1] In his response to the FORM, Applicant stated that he began dating his wife in 2002. However, his security clearance application reflects that he lived in Alaska in 2002 and was not assigned to Korea until April 2004.

mother-in-law is a citizen and resident of Russia. She is retired from the same power company where Applicant's wife worked. Applicant and his wife have contact with his mother-in-law about once a week. His mother-in-law visited him and his wife for about two months in 2009, while they were stationed in Italy. His wife's father passed away when she was a child. (PSI at 2-3.)

In his response to the FORM, Applicant stated that his wife does not ask him about his work, other than asking, "How was your day?" He declared that he would terminate their relationship immediately if he had any concerns about her loyalty to him or any reason to believe she was trying to gather intelligence information.

Applicant describes his access to classified material or systems as "minimal at best." However, he is required to have a clearance in order to enter the controlled areas where he works. His site leader states that he does not have access to classified information. (Response to FORM.)

Applicant's site leader, who has deployed twice with him, describes his work as "outstanding." An Air Force colleague, who has known Applicant for 23 years, considers him as "a person of impeccable character." The Air Force colleague has known Applicant's wife for ten years and describes her as a stay-at-home housewife and "a person of upstanding character." She has never asked the Air Force colleague about his job or anything related to sensitive or classified information. (Response to FORM.)

I have taken administrative notice that Russia is one of the top three most aggressive and capable collectors of economic information and technological intelligence from U.S. sources. I have also taken administrative notice that Russia provides military and missile technologies to countries of security concern, including China, Iran, Syria, and Venezuela, and that Russian military programs continue to be driven by the perception that the United States and the North Atlantic Treaty Organization are its principal strategic challenges and greatest potential threat. Finally, I have taken administrative notice that Russia's human rights record is uneven, and in some areas is poor. The judiciary is not independent and is subject to manipulation by political authorities. Abuses include attacks on journalists, physical abuse by law enforcement officers, harsh prison conditions, arbitrary detention, politically motivated imprisonment, electronic surveillance without judicial permission, warrantless searches of residences and other premises, and widespread corruption in the executive, legislative, and judicial branches.

Policies

"[N]o one has a 'right' to a security clearance." *Department of the Navy v. Egan*, 484 U.S. 518, 528 (1988). As Commander in Chief, the President has the authority to "control access to information bearing on national security and to determine whether an individual is sufficiently trustworthy to have access to such information." *Id.* at 527. The President has authorized the Secretary of Defense or his designee to grant applicants eligibility for access to classified information "only upon a finding that it is clearly

consistent with the national interest to do so." Exec. Or. 10865, *Safeguarding Classified Information within Industry* § 2 (Feb. 20, 1960), as amended.

Eligibility for a security clearance is predicated upon the applicant meeting the criteria contained in the AG. These guidelines are not inflexible rules of law. Instead, recognizing the complexities of human behavior, an administrative judge applies these guidelines in conjunction with an evaluation of the whole person. An administrative judge's overarching adjudicative goal is a fair, impartial, and commonsense decision. An administrative judge must consider all available, reliable information about the person, past and present, favorable and unfavorable.

The Government reposes a high degree of trust and confidence in persons with access to classified information. This relationship transcends normal duty hours and endures throughout off-duty hours. Decisions include, by necessity, consideration of the possible risk that the applicant may deliberately or inadvertently fail to safeguard classified information. Such decisions entail a certain degree of legally permissible extrapolation about potential, rather than actual, risk of compromise of classified information.

Clearance decisions must be made "in terms of the national interest and shall in no sense be a determination as to the loyalty of the applicant concerned." *See* Exec. Or. 10865 § 7. Thus, a decision to deny a security clearance is merely an indication the applicant has not met the strict guidelines the President and the Secretary of Defense have established for issuing a clearance.

Initially, the Government must establish, by substantial evidence, conditions in the personal or professional history of the applicant that may disqualify the applicant from being eligible for access to classified information. The Government has the burden of establishing controverted facts alleged in the SOR. *See Egan*, 484 U.S. at 531. "Substantial evidence" is "more than a scintilla but less than a preponderance." *See v. Washington Metro. Area Transit Auth.*, 36 F.3d 375, 380 (4th Cir. 1994). The guidelines presume a nexus or rational connection between proven conduct under any of the criteria listed therein and an applicant's security suitability. *See* ISCR Case No. 92-1106 at 3, 1993 WL 545051 at *3 (App. Bd. Oct. 7, 1993).

Once the Government establishes a disqualifying condition by substantial evidence, the burden shifts to the applicant to rebut, explain, extenuate, or mitigate the facts. Directive ¶ E3.1.15. An applicant has the burden of proving a mitigating condition, and the burden of disproving it never shifts to the Government. *See* ISCR Case No. 02-31154 at 5 (App. Bd. Sep. 22, 2005).

An applicant "has the ultimate burden of demonstrating that it is clearly consistent with the national interest to grant or continue his security clearance." ISCR Case No. 01-20700 at 3 (App. Bd. Dec. 19, 2002). "[S]ecurity clearance determinations should err, if they must, on the side of denials." *Egan*, 484 U.S. at 531; *see* AG ¶ 2(b).

Analysis

Guideline B, Foreign Influence

The security concern under this guideline is set out in AG ¶ 6 as follows:

> Foreign contacts and interests may be a security concern if the individual has divided loyalties or foreign financial interests, may be manipulated or induced to help a foreign person, group, organization, or government in a way that is not in U.S. interests, or is vulnerable to pressure or coercion by any foreign interest. Adjudication under this Guideline can and should consider the identity of the foreign country in which the foreign contact or financial interest is located, including, but not limited to, such considerations as whether the foreign country is known to target United States citizens to obtain protected information and/or is associated with a risk of terrorism.

Three disqualifying conditions under this guideline are relevant to this case:

> AG ¶ 7(a): contact with a foreign family member, business or professional associate, friend, or other person who is a citizen of or resident in a foreign country if that contact creates a heightened risk of foreign exploitation, inducement, manipulation, pressure, or coercion;
>
> AG ¶ 7(b): connections to a foreign person, group, government, or country that create a potential conflict of interest between the individual's obligation to protect sensitive information or technology and the individual's desire to help a foreign person, group, or country by providing that information; and
>
> AG ¶ 7(c): sharing living quarters with a person or persons, regardless of citizenship status, if that relationship creates a heightened risk of foreign inducement, manipulation, pressure, or coercion.

AG ¶¶ 7(a) and (c) require substantial evidence of a "heightened risk." The "heightened risk" required to raise one of these disqualifying conditions is a relatively low standard. "Heightened risk" denotes a risk greater than the normal risk inherent in having a family member living under a foreign government or living with a person who is a citizen of a foreign country.

The totality of an applicant's family ties to a foreign country as well as each individual family tie must be considered. ISCR Case No. 01-22693 at 7 (App. Bd. Sep. 22, 2003). "[T]here is a rebuttable presumption that a person has ties of affection for, or obligation to, the immediate family members of the person's spouse." ISCR Case No. 01-03120, 2002 DOHA LEXIS 94 at * 8 (App. Bd. Feb. 20, 2002).

Guideline B is not limited to countries hostile to the United States. "The United States has a compelling interest in protecting and safeguarding classified information from any person, organization, or country that is not authorized to have access to it, regardless of whether that person, organization, or country has interests inimical to those of the United States." ISCR Case No. 02-11570 at 5 (App. Bd. May 19, 2004).

Furthermore, "even friendly nations can have profound disagreements with the United States over matters they view as important to their vital interests or national security." ISCR Case No. 00-0317, 2002 DOHA LEXIS 83 at **15-16 (App. Bd. Mar. 29, 2002). Finally, we know friendly nations have engaged in espionage against the United States, especially in the economic, scientific, and technical fields. Nevertheless, the nature of a nation's government, its relationship with the United States, and its human rights record are relevant in assessing the likelihood that an applicant's family members are vulnerable to government coercion. The risk of coercion, persuasion, or duress is significantly greater if the foreign country has an authoritarian government, a family member is associated with or dependent upon the government or the country is known to conduct intelligence operations against the United States.

The evidence that Applicant's wife is a Russian citizen and his mother-in-law is a citizen and resident of Russia establishes AG ¶¶ 7(a), (b), and (c). The "heightened risk" required to establish these disqualifying conditions is established by Russia's extensive and aggressive collection of sensitive information and its record of targeting the United States for economic and technological information. Although Applicant's mother-in-law is no longer employed by the Russian government, she is retired and dependent on the Russian government for whatever pension she receives.

Security concerns under this guideline can be mitigated by showing that "the nature of the relationships with foreign persons, the country in which these persons are located, or the positions or activities of those persons in that country are such that it is unlikely the individual will be placed in a position of having to choose between the interests of a foreign individual, group, organization, or government and the interests of the U.S." AG ¶ 8(a). This mitigating condition is not established because of the connections of Applicant's wife and his mother-in-law to Russia, a country that aggressively targets the United States for economic and technological information.

Security concerns under this guideline also can be mitigated by showing "there is no conflict of interest, either because the individual's sense of loyalty or obligation to the foreign person, group, government, or country is so minimal, or the individual has such deep and longstanding relationships and loyalties in the U.S., that the individual can be expected to resolve any conflict of interest in favor of the U.S. interest." AG ¶ 8(b). Applicant's sense of loyalty to his wife is not minimal. His sense of loyalty to his mother-in-law is more difficult to measure, but he has not rebutted the presumption that he has feelings of obligation to her. Applicant has strong ties to the United States, demonstrated by his extensive and distinguished military service, his long record of holding a security clearance without incident, and his current deployment to a combat

zone in support of U.S. interests. His wife's ties to the United States are minimal. She is not a U.S. citizen, and she has resided in the United States for only two years.

Because Applicant requested a decision on the written record, it is difficult to assess the sincerity and credibility of Applicant and his wife, the nature and intensity of their interaction, the likelihood that his wife would attempt to influence him, and the likelihood that Applicant would succumb to facially innocuous attempts by his wife to obtain sensitive information from him. I have no doubts that Applicant's loyalty to the United States would cause him to reject overt attempts to obtain sensitive information, but I am less confident that he would recognize and reject sophisticated and subtle attempts by his wife or by experienced intelligence agents using her or her mother as conduits to obtain information. The nature, extent, and aggressiveness of Russian intelligence agencies targeting the United States place a very heavy burden of persuasion on Applicant to show that he would resolve any potential conflict of interest in favor of the interests of the United States. I conclude that AG ¶ 8(b) is not established.

I have considered the fact that Applicant currently does not have access to classified information or need such access to perform his current duties, but I have given that fact little weight for two reasons. First, he had access to classified information while on active duty; and second, if he receives a security clearance, he will be eligible for access to classified information in future assignments without going through the security clearance process again.

Security concerns under this guideline also may be mitigated by showing that "contact or communication with foreign citizens is so casual and infrequent that there is little likelihood that it could create a risk for foreign influence or exploitation." AG ¶ 8(c). Applicant has regular contact with his mother-in-law, and she visited him for two months in 2009. I conclude that this mitigating condition is not established.

Whole-Person Concept

Under AG ¶ 2(c), the ultimate determination of whether to grant eligibility for a security clearance must be an overall commonsense judgment based upon careful consideration of the guidelines and the whole-person concept. In applying the whole-person concept, an administrative judge must evaluate an applicant's eligibility for a security clearance by considering the totality of the applicant's conduct and all relevant circumstances. An administrative judge should consider the nine adjudicative process factors listed at AG ¶ 2(a):

> (1) the nature, extent, and seriousness of the conduct; (2) the circumstances surrounding the conduct, to include knowledgeable participation; (3) the frequency and recency of the conduct; (4) the individual's age and maturity at the time of the conduct; (5) the extent to which participation is voluntary; (6) the presence or absence of rehabilitation and other permanent behavioral changes; (7) the motivation

for the conduct; (8) the potential for pressure, coercion, exploitation, or duress; and (9) the likelihood of continuation or recurrence.

I have incorporated my comments under Guideline B in my whole-person analysis. Some of the factors in AG ¶ 2(a) were addressed under that guideline, but some warrant additional comment.

Applicant has served his country with distinction for many years, as a member of the U.S. Air Force and now as an employee of a defense contractor. Nevertheless, his marriage to a citizen of Russia has created a potential conflict of interest. He has declared unequivocally that he would terminate his relationship with his wife if she attempted to elicit classified or sensitive information from him. However, with only a written record before me, I am unable to question him or assess his demeanor, and my ability to evaluate his sincerity and credibility is limited.

After weighing the disqualifying and mitigating conditions under Guideline B, evaluating all the evidence in the context of the whole person, and mindful of my obligation to resolve close cases in favor of national security, I conclude Applicant has not mitigated the security concerns based on foreign influence. Accordingly, I conclude he has not carried his burden of showing that it is clearly consistent with the national interest to continue his eligibility for access to classified information.

Formal Findings

I make the following formal findings on the allegations in the SOR:

Paragraph 1, Guideline B (Foreign Influence):	AGAINST APPLICANT
Subparagraphs 1.a-1.b:	Against Applicant

Conclusion

I conclude that it is not clearly consistent with the national interest to continue Applicant's eligibility for a security clearance. Eligibility for access to classified information is denied.

LeRoy F. Foreman
Administrative Judge